

Fax Message

To: 12126589480

Fax: 12126589480

From: Nyiela F Barret

Date: 10/5/2012 1:57 PM

Pages: 1 of 19 (including this page)

Subject: Good Afternoon,

Good Afternoon,

Please see the attached from the Hon. Peter H. Moulton.

Nyiela F. Barret
Secretary to Hon. Peter Moulton
111 Centre St.
Room 838
New York, NY 10013
(646) 386-5429

Supreme Court: New York County
Part 40B

-----X
In the Matter of the Application of
ERIKA LEFEVRE AND ALAIN LEFEVRE,

Petitioners,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 114645/11

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X
Peter H. Moulton, Justice

Petitioners brought this Article 78 proceeding for an order directing the disclosure of public records by the New York City Police Department ("the NYPD") concerning the death of their son Mathieu Lefevre. Respondent cross-moves to dismiss the petition. Respondent also moves to quash a notice to admit served by petitioners while the petition and motion to dismiss were pending. Finally, two proposed amici curiae, City Councilmember Brad Lander and Transportation Alternatives, seek to submit a joint brief in support of the petitioners.

BACKGROUND

Mathieu Lefevre was riding his bicycle in Bushwick, Brooklyn in the early morning hours of October 19, 2011 when he was hit by a truck at the intersection of Meserole and Morgan Streets. Lefevre died at the scene. He was 30 years old. A police investigation ensued.

Lefevre's parents sought to learn about the circumstances of their son's death by seeking records of the NYPD's investigation through the Freedom of Information Law ("FOIL"). (POL § 84 et seq.) In a letter dated November 1, 2011, submitted to the NYPD by their counsel, petitioners sought a comprehensive array of documents and other materials held by the police department. In particular, the letter emphasized that the Lefevres wished to see any video concerning the incident held by the NYPD. By letter dated November 9, 2011, the NYPD acknowledged petitioners' request and stated that a determination would be made within twenty business days.¹

The NYPD's Record Access Officer ("RAO") denied petitioners'

¹In a letter dated November 11, 2011, petitioners' counsel wrote to the NYPD arguing that the NYPD's November 9th response was not provided within five business days, as required by POL § 89(3)(a). The petitioners' letter asserted that the failure to timely respond would be treated as a "constructive denial." This prompted a response from the NYPD pointing out that the November 9th letter was timely, in that November 8th, election day, was not counted as a "business day."

FOIL request by letter dated December 9, 2011. The letter states three grounds for the denial:

The NYPD's investigation of this matter is ongoing. As such, the records you requested are exempt from disclosure pursuant to POL § 87(2)(e)(i) and (ii). Moreover information in the records is also exempt from disclosure pursuant to POL § 87(2)(b) and 89(2).

Section 87(2)(e)(i) and (ii) invoked in the December 9, 2011 letter, state in relevant part:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(e) are compiled for law enforcement purposes and which, if disclosed, would,
(i) interfere with law enforcement investigations or judicial proceedings;
(ii) deprive a person of a right to a fair trial or impartial adjudication.

The third ground for nondisclosure invoked in the letter arises from POL § 87(2)(b). This section states that public records shall be made available for inspection and copying except in cases where:

if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [POL § 89(2)].

POL § 89(2) provides a non-exhaustive list of "unwarranted invasions of personal property." The December 9th letter does not

specify which of these invasions of personal property would be caused by petitioners' FOIL request.

By letter dated December 12, 2011, petitioners administratively appealed the denial of access to the records concerning Lefevre's death. Pursuant to POL § 89(4)(a), the NYPD had ten business days to respond to the appeal. This period elapsed on December 27, 2011, and petitioners brought the instant proceeding on December 30, 2011.

On December 29, 2011, two days after the elapse of the appeal period but before the filing of the petition in this proceeding, the NYPD responded to the appeal by letter in which the Appeals Officer granted the petitioners' appeal and remanded the matter to the RAO "to access the requested records." It appears that the term "to access" in this context means that the records would be produced, though perhaps in redacted form. This letter arrived at petitioners' counsel's office after the filing of the instant Article 78 proceeding.

According to respondent, the criminal investigation was completed on January 4, 2012. The relevant materials were then turned to NYPD counsel for review prior to production.

By letter dated January 20, 2012, the RAO informed the petitioners that the NYPD's Accident Investigation Squad ("AIS")

had concluded its investigation. The letter provided 158 pages of documents and four video files.

In its motion to dismiss, dated February 9, 2012, the NYPD states that "the RAO issued a FOIL determination granting access to each and every record located by the Respondent pursuant to a diligent search."

This statement has been undermined by the NYPD's supplemental production of items not included in the January 20, 2012 production.

On February 17, 2012, the NYPD provided photographs taken by police photographers at the scene. According to the NYPD, it inadvertently produced two copies of a video on January 20th, instead of providing the photographs.

On March 26, 2012, NYPD completed its production of the memo books of officers involved in the investigation. The NYPD contends that it was unable to provide the memo books without the shield numbers of the officers in question. It is unclear from respondent's motion papers why the identities of police officers involved in a focused, finite, investigation of a single traffic incident are not readily available to respondent. In any event, this identifying information was provided by petitioners' counsel in a letter dated February 17, 2012, and all the log books were

turned over more than a month later.

On April 18, 2012, the day before oral argument on the petition and the motion, the NYPD produced two audio files to petitioners. These audio files were not the same as previously produced transcriptions of the files, but that discrepancy is explained by the fact that the audio files include transmissions that do not pertain to the incident. Respondent's counsel states that she attempted to redact the audio files to pare them down only to the relevant portions, but that the process was laborious and the petitioners' urgency in demanding the records caused her to provide the complete transmissions. The transcriptions provided on January 20 are not verbatim, and instead use a partial shorthand containing radio technician abbreviations and symbols.

Petitioners also contend that one of the videos that was included in the January 20th production was unreadable, and that the software necessary to read the video was also within the ambit of their FOIL request. Respondent's counsel informed petitioners' counsel that the correct software was Geovision Codec. Because the tape was obtained from a third party's surveillance camera, the NYPD states that it had no obligation to provide the Geovision Codec software to petitioners, and indeed would have violated copyright laws had it done so. NYPD relied on one of its officers'

personal laptops to view the tapes, and NYPD's counsel at least initially invited petitioners' counsel to view the tapes at the NYPD's offices. Petitioners aver that this offer was later rescinded.

Because of these subsequent productions, the court directed the parties to supplement their submissions after oral argument on April 19. In its papers, respondent asserts that it has now provided all records within the ambit of petitioners' FOIL request.

DISCUSSION

A. Motion for Leave to File an Amicus Curiae Memorandum in Support of Petitioners

Two proposed amici curiae, City Councilmember Brad Lander and Transportation Alternatives ("amici"), seek to submit a joint brief in support of the petitioners. Amici seek to bring to this court's attention the difficulties individuals and organizations have had in obtaining via FOIL police records of bicycle/vehicle collisions. Amici state that the NYPD reflexively invokes "blanket" FOIL exemptions without any case by case analysis of the applicability of the exemption to a given FOIL request. Amici further deplore what they characterize as the NYPD's consistent use of the media to "blame the victim" in vehicle/bicycle accidents. There is also a

minor theme in amici's papers that the NYPD and District Attorneys fail to vigorously investigate and prosecute operators of motor vehicles who injure or kill bicycle riders. The proposed memorandum of law is supported in part by an Affidavit of Juan Martinez, an attorney at Transportation Alternatives, who recites several instances where that organization was allegedly stymied in seeking police records of bicycle/vehicle accidents.

The court respectfully declines amici's submission. This proceeding concerns a review of the NYPD's response to two petitioners' FOIL requests, in the context of Article 78, which allows for review of agency action in an expedited proceeding where discovery is discouraged. Amici raise important issues, but they are not issues that are determinative of the Lefevre's challenge to the Police Department's production.

In any event, petitioners' counsel have competently set forth their case. In their papers they have recited the facts of the LeFevres' FOIL request and measured the NYPD's response to that request against applicable precedent and the public policies that underlie FOIL.

B. Motion to Quash Petitioners' Notice to Admit

Petitioners served respondent with a notice to admit before

respondent's motion to dismiss was decided by the court, and before there was any determination that there would be a hearing in this matter. Accordingly, it is premature. Even if the notice to admit was timely, its content is palpably improper. Notices to admit should be designed to eliminate issues about which there will not be a dispute at trial. (HSBC Bank USA, N.A. v Halls, 98 AD3d 718 [2d Dep't 2012].) The instant notice to admit seeks admissions about a number of contested issues, including whether respondent has a blanket policy of denying FOIL requests that pertain to traffic accident records where an investigation remains open. A notice to admit is proper only where counsel serving the notice to admit seeks admissions on matters about which she "reasonably believes that there can be no substantial dispute at trial." (CPLR 3123.) The court declines to prune the requests to bring them into conformity with CPLR 3123. (E.g. Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison, 214 AD2d 453 [1st Dep't 1995].)

C. Exhaustion of Administrative Remedies

As a threshold matter, respondent argues that the petition should be dismissed because petitioners failed to exhaust their administrative remedies. This argument fails. Under FOIL, an agency has ten business days to respond to an administrative

appeal. (POL § 89[4][a].) It is undisputed that the appeal was not decided until December 29, 2011, two days after the deadline for a decision on appeal. When the ten days elapsed, petitioners were entitled to treat the NYPD's silence as a constructive denial. (Council of Regulated Adult Liq. Licensees v New York City Police Dep't, 300 AD2d 17 [1st Dep't 2002].)

D. The Petition and the Motion to Dismiss

The purpose of the Freedom of Information Law is to further governmental transparency and protect the public's right to know. Accordingly, any FOIL exemptions are interpreted narrowly. (See Matter of Markowitz v Serio, 11 NY3d 43, 51 [2008].) The burden on proving any exemption rests with the NYPD. Id. at 50.) The NYPD may not rely on blanket assertions of exemption, at least where the petitioners are not individuals facing pending criminal investigations. (Compare Matter of Carnevale v City of Albany, 68 AD3d 1290 [3rd Dep't 2009] with Matter of Legal Aid Socy. v New York City Police Department, 274 AD2d 207 [1st Dep't 2000], lv denied 95 NY2d 956.)

According to Detective Gerard Sheehan, who was assigned to investigate the death of Mathieu Lefevre, the NYPD completed its investigation of the incident when it obtained and viewed the

surveillance video from a nearby storage facility located near the accident site on December 18, 2011.² According to Detective Sheehan, the NYPD had been unable to immediately contact the owner of the storage facility in order to get a copy of the video. Once NYPD personnel were able to view the video, they confirmed the truck driver's account of the incident, according to Sheehan. He concludes:

Had the video depicted a version inconsistent with the driver's statements with regard to the driver's [denial of] knowledge that he struck someone, criminal charges could have been brought against the driver. However a review of the video did not disclose such inconsistencies.

(Affidavit of Gerard Sheehan, sworn to on February 27, 2012, ¶ 6.)

This explanation sufficiently demonstrates that production of the file prior to December 18, 2011, might have "interfered with law enforcement investigations or judicial proceedings." (POL § 87(2)(e)(i).) As the NYPD was considering charging the driver, public disclosure of its records could have compromised its investigation by exposing what the NYPD knew about the incident and poisoning potential leads for further investigation. Accordingly, the NYPD has demonstrated that it had a specific, good faith basis

²This is apparently the same video that petitioners had difficulty viewing.

for finding its records were exempt from FOIL. NYPD's legal staff was also entitled to a few days after December 18, 2011, to review the records before production.³

However, the record before the court demonstrates that the NYPD needlessly delayed handing over the documents and other materials. While it is clear that the NYPD had determined to provide its records to petitioners as of December 29, 2011, it is unclear why the NYPD waited until January 20, 2012 to make its first production. Additionally, as noted above, the NYPD compounded the delay of this late production by failing to provide items that it should have initially provided. The failure to provide photographs appears to have been a simple mistake. However, there is no adequate explanation regarding the NYPD's purported inability to determine the officers whose log books might have had relevant information about the incident. Therefore there is no justification in the record before the court for the delay that ensued from this excuse.

³ The NYPD also argues that as the driver was at risk of criminal prosecution prior to December 18, 2011 the release of the file could have led to dissemination of the video and other materials, potentially leading to public vilification of the driver thereby potentially depriving him of his "right to a fair trial or impartial adjudication." (POL § 87(2)(e)(ii).) This argument is plausible, but it is not adequately supported by the NYPD's factual showing before the court.

The delay in providing the audio tapes appears to have arisen from a good faith effort by NYPD's counsel to excise irrelevant material. The delay in providing the audio tapes is mitigated somewhat by the fact that partial transcriptions of the relevant audio was provided in the initial production.

While these delays in production were longer than necessary, and were no doubt more than agonizing to petitioners, the NYPD's records have now been produced. Even where there has been such delay, the First Department has held that a petition must be dismissed as moot when the respondent provides records responsive to the request during the pendency of the proceeding. (Matter of Tellier v New York City Police Dep't, 267 AD2d 9 [1st Dep't 1999].) That is especially true here where the NYPD agreed to produce its records before this proceeding was filed. (See Stop the Madrassa Community Coalition v New York City Dep't of Educ., 20 Misc3d 1116[A] [Sup. Ct. New York County 2008].)

E. Attorneys' Fees

Attorneys fees are available pursuant to POL § 89(4)(c) where a party has "substantially prevailed" and

- i. the agency had no reasonable basis for denying access; or

ii. the agency failed to respond to a request or appeal within the statutory time.

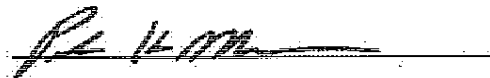
While petitioners have demonstrated that respondent failed to timely respond to its appeal, it cannot show that it substantially prevailed in this action. That is because the NYPD had taken steps to begin production responsive to petitioners' FOIL request prior to the filing of this action. (Cf. Matter of New York State Defenders Ass'n v New York State Police, 87 AD3d 193 [3d Dep't 2011] [attorneys' fees can be awarded where documents responsive to a FOIL request are produced for the first time as an attachment to the answer to petition].) Unless the production is caused by the litigation, a petitioner is not considered to have "substantially prevailed" in the litigation. (See Matter of Freidland v Maloney, 148 AD2d 814 [3rd Dep't 1989]; Stop the Madrassa, supra, 20 Misc3d 1116[A].)

CONCLUSION

For the reasons stated, it is ORDERED that 1) the motion by amici curiae to submit a memorandum in support of petitioners is denied; and 2) respondent's motion to quash petitioners' notice to admit is granted; and 3) respondent's cross-motion to dismiss is granted to the extent that this proceeding is moot. It is further

ADJUDGED that the petition is denied as moot and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Date: October 5, 2012



AJSC

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART YOB

Enka & Alan Lefevre

INDEX NO. 114645/11

MOTION DATE _____

MOTION SEQ. NO. 001

NYC Police Dept

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is Petition and
Cross Motion are decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/4/12

Peter H. Moulton J.S.C.
HON. PETER H. MOULTON
SUPREME COURT JUSTICE

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE

Justice

PART 40B

S. H. C. & M. L. L. L. L.

-v-

NYC Police Dept

INDEX NO. 117645-11

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*Decided in accordance with the
Decision order and judgment in
connection with motion Seq 001*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/7/12

Peter H. Moulton, J.S.C.

HON. PETER H. MOULTON
SUPREME COURT

1. CHECK ONE: ☒ CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PETER H. MOULTON
SUPREME COURT JUSTICE
PRESENT: _____
Justice

PART 463

Ernest Mankin

INDEX NO. 114645-11

MOTION DATE _____

MOTION SEQ. NO. 003

NYC Police Dept

The following papers, numbered 1 to _____, were read on this motion to/for _____.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Decided in accordance
with the Rules: as a and judgment
in connection with motion seq 001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/11/12

1. CHECK ONE:

☒ CASE DISPOSED

2. CHECK AS APPROPRIATE:

MOTION IS:

☐ GRANTED

☐ DENIED

☐ GRANTED IN PART

☐ OTHER

3. CHECK IF APPROPRIATE:

☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT

☐ REFERENCE

P. H. Moulton, J.S.C.
HON. PETER H. MOULTON
SUPREME COURT JUSTICE
☐ NON-FINAL DISPOSITION